Supreme Court, U.S.
FILED
SEP 19 1972
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1971

No. 71-1071

SAMUEL SAIKEN,

Petitioner,

vs.

ILLINOIS,

Respondent.

(On Writ of Certiorari to the Supreme Court of the State of Illinois.)

PETITION FOR CERTIORARI

JOHN J. O'TOOLE
111 W. Washington Street
Chicago, Illinois 60602

PETER GEORGES
10 S. LaSalle Street
Chicago, Illinois 60603

KEENAN PRINTING COMPANY

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Question Presented	2
Constitutional Provision Involved	2
Statement of the Case	3
Argument	7
Conclusion	10
Appendix A—Opinion of Supreme Court of Illinois	A1
Appendix B—Denial of Petition for Rehearing	A14

CASES

Aguilar v. *Texas*, 378 U.S. 108 (1964)	6, 7
Jones v. *United States*, 362 U.S. 257 (1960)	6, 7
Spinelli v. *United States*, 393 U.S. 410 (1969)	6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1971

No.

SAMUEL SAIKEN,

Petitioner,

vs.

ILLINOIS,

Respondent.

(On Writ of Certiorari to the Supreme Court of the State of Illinois.)

PETITION FOR CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of the State of Illinois (Apx. A, p. A1) is reported at 49 Ill. 2d 504 and 275 N. E. 2d 381.

JURISDICTION

The opinion of the Supreme Court of the State of Illinois sought to be reviewed was entered on October 4, 1971 (Apx. A. p. A1).

A Petition for Rehearing was denied by the Supreme Court of the State of Illinois on November 24, 1971 (Apx. B, p. A14).

The jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of Illinois by writ of *certiorari* is conferred by 28 U.S.C. 1257 (3).

QUESTION PRESENTED

Is an affidavit which is based solely on hearsay and which contains *no* underlying circumstances of fact and *no* facts relating to the reliability of the informant, sufficient to establish cause for the issuance of a search warrant? *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Spinelli* v. *United States*, 393 U.S. 410 (1969).

CONSTITUTIONAL PROVISION INVOLVED

This petition involves the due process and equal protection of the law clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws".

STATEMENT OF THE CASE

Samuel Saiken was indicted in the Circuit Court of Cook County on March 10, 1969 for the crimes of murder and of conspiracy to obstruct justice (Rec. C-3-5).

On February 18, 1969, Joel Saiken, petitioner's son, told the Indiana State Police that a body was buried behind the goose house on his father's farm. (Rec. C-63).

Pursuant to a hearsay affidavit, which provided in full (Apx: A, A4):

> State of Indiana)
> County of Porter) ss:
>
> Before the Hon. Harry Estler, Justice of the Peace
>
> In the matter of a search for a dead human body believed to have been illegally procured:
>
> Docket 25, Page 420, Cause No. 10-229
>
> HARRY YOUNG swears that by virtue of information voluntarily conveyed to him by one JOEL SAIKIN on Tuesday, the 18th day of February, 1969, affiant has good reasons to believe, and does believe, that a dead human body, to-wit, female approximately seventeen (17) years of age is secreted in and about the following real estate in Porter County, Indiana:
>
> The East ½ of the Southeast ¼ of the Southwest ¼ of Section 17, Township 37 North, Range 5 West of the Second Principal Meridian, containing about 20 acres more or less,
>
> said real estate being the property of Sam D. and Minnie Saikin, said dead body being secreted in the

following place and manner, to-wit: buried beneath the ground behind the goose house on said premises, originally buried under or near a manure pile located behind or near the goose house on said premises, said manure pile subsequent thereto having been removed.

Under and according to the provisions of Acts 1905, page 169, paragraph 61, the same being codified at Burns Indiana Statutes 9-607, that the Honorable Judge of this Court, taking with him such constables and police officers as he shall designate, enter, inspect and search said premises for such dead female human body as soon as may be reasonably convenient to said Court and said judge.

Further affiant sayeth not.

HARRY YOUNG,
Harry Young, Affiant

Subscribed and sworn to before me, on this 19th day of February, 1969.

HARRY W. ESTLER,
Justice of the Peace.

My Commission expires 12-31-71.

Harry Young, a detective with the Indiana State Police procured a search warrant on February 19, 1969 and accompanied by the issuing Justice of the Peace went to the Saiken farm and conducted a search for the body, but failed to find it (Rec. 9-12). Later that night, Officer Young contacted Joel Saiken who gave him additional information (Rec. 21). The following morning, without obtaining a new search warrant, and not in the

company of the issuing Justice, Officer Young went back to the farm and with the additional information supplied by Joel Saiken found the body (Rec. 14-17).

A Petition to Suppress Evidence was filed on March 27, 1969, in relation to the aforementioned searches (Rec. C-23) which in part provided:

> "That the aforesaid search and seizure was accomplished in violation of defendant's right *** under the Fourteenth Amendment of the Constitution of the United States,. ***".

The trial court denied the aforementioned Petition to Suppress Evidence on April 9, 1969. (Rec. C-31) by stating:

> "*** This cause coming on before the court on hearing upon the PETITION TO SUPPRESS EVIDENCE heretofore filed herein in this cause.
>
> And the court hearing counsel for said defendant in support of said motion as well as State's Attorney, counsel for the people in opposition thereto, and the court being fully advised in the premises doth DENY SAID MOTION AND ORDERS THAT said motion be and the same is hereby DENIED accordingly ***".

Thereafter trial was had and petitioner was found not guilty of murder (Rec. C-88), but the jury did return a verdict of guilty of conspiracy to obstruct justice (Rec. C-90). On September 23, 1969, judgment was entered on the verdict and petitioner was sentenced to the Illinois State Penitentiary for not less than two years nor more than three years (Rec. C-92, C-93).

Notice of Appeal to the Supreme Court of the State of Illinois was filed on October 21, 1969 (Rec. C-96). Thereafter appellant's brief was filed in which it was alleged:

> "**** The search warrant was issued and the subsequent searches were conducted in contravention of the Fourth and Fourteenth Amendments to the Constitution of the United States, ****".

Thereafter the Supreme Court of the State of Illinois after discussing *Aguilar* v. *Texas*, 378 U.S. 108, 111 (1964); *Spinelli* v. *United States*, 393 U.S. 410, 419 (1969); *Jones* v. *United States*, 362 U.S. 257 (1960), in relation to the constitutionality of search and seizure under the Fourteenth Amendment to the Constitution of the United States stated (Apx. A, p. A10):

> "We believe there was substantial basis for crediting the hearsay information, and that the search warrant was properly issued upon the affidavit".

The Petition for Rehearing attacked the constitutionality under the Fourth and Fourteenth Amendments to the Constitution of the United States of the validity of the search warrant herein, discussing *Aguilar* v. *Texas*, 378 U.S. 108 (1964) and *Spinelli* v. *U.S.*, 393 U.S. 410 (1969) and concluding: "The affidavit is totally insufficient under Federal or Illinois standards to constitutionally support the search warrant or the search itself". The Petition for Rehearing was summarily denied on November 24, 1971 (Apx. B, p. A14). This Petition for *Certiorari* follows.

ARGUMENT

AN AFFIDAVIT BASED SOLELY UPON HEARSAY IS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE FOR THE ISSUANCE OF A SEARCH WARRANT WHERE IT DOES NOT CONTAIN ANY UNDERLYING CIRCUMSTANCES OF FACT OR ANY UNDERLYING CIRCUMSTANCES OF RELIABILITY OF THE INFORMANT.

Where an affidavit is based upon hearsay, as herein; *the Judge must be informed in the affidavit* of: (a) some underlying circumstances from which the informant concluded that the property sought was where the informant claimed it was; and (b) *the affidavit must also contain* some underlying circumstances and facts from which the affiant concluded that the informant was reliable. *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Spinelli* v. *U.S.*, 393 U.S. 410 (1969); *Jones* v. *U.S.*, 362 U.S. 257 (1960).

The Supreme Court of the State of Illinois agreed that the aforesaid is not only the law of the land but the law in the State of Illinois (Apx. A, p. A9-A10). However, it sustained the validity of the issuance of the search warrant herein which was based on the affidavit of Officer Young by stating (Apx. A, p. A10).

> "In the case at bar, the informant, Joel Saiken, personally saw or perceived the facts asserted. He buried the body. A number of facts are recited as to the location of the body, and we have the first situation referred to by Mr. Justice White. The remaining question is whether there is a basis presented in the affidavit to suggest that the informant is honest in what he has said. The assertions of the informant—that he buried and hid a dead body—

constitutes an admission of his implication in a crime, which is sufficient to lend credence to what he had said. We believe there was substantial basis for crediting the hearsay information, and that the search warrant was properly issued upon the affidavit".

The affidavit of Officer Young did not contain the facts recited by the Illinois Supreme Court. That affidavit provides in full (Apx. A. A4):

State of Indiana } ss:
County of Porter }

Before the Hon. Harry Estler, Justice of the Peace

In the matter of a search for a dead human body believed to have been illegally procured.

Docket 25, Page 420, Cause No. 10-229

HARRY YOUNG swears that by virtue of information voluntarily conveyed to him by one JOEL SAIKIN on Tuesday, the 18th day of February, 1969, affiant has good reasons to believe, and does believe, that a dead human body, to-wit, female approximately seventeen (17) years of age is secreted in and about the following real estate in Porter County, Indiana:

The East ½ of the Southeast ¼ of the Southwest ¼ of Section 17, Township 37 North, Range 5 West of the Second Principal Meridian, containing about 20 acres more or less,

said real estate being the property of Sam D. and Minnie Saikin, said dead body being secreted in the following place and manner, to-wit: buried beneath the ground behind the goose house on said premises,

originally buried under or near a manure pile located behind or near the goose house on said premises, said manure pile subsequent thereto having been removed.

Under and according to the provisions of Acts 1905, page 169, paragraph 61, the same being codified at Burns Indiana Statutes 9-607, that the Honorable Judge of this Court, taking with him such constables and police officers as he shall designate, enter, inspect and search said premises for such dead female human body as soon as may be reasonably convenient to said Court and said judge.

Further affiant sayeth not.

HARRY YOUNG.
Harry Young, Affiant

Subscribed and sworn to before me, on this 19th day of February, 1969.

HARRY W. ESTLER.
Justice of the Peace.

My Commission expires 12-31-71.

This affidavit was insufficient to support the issuance of the search warrant herein for it does not establish any underlying factual circumstances, for it does not say "the informant, Joel Saiken, personally saw or perceived the facts asserted". It does not say "he buried the body".

In relation to the question of reliability the warrant does not say that "he buried and hid a dead body" and in no manner did it "constitute an admission of his implication in a crime".

In essence the affidavit of Officer Young says: I had a conversation with one Joel Saiken, and I verily believe

there is a body buried at X location. The affidavit is insufficient to support the issuance of a search warrant under the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court of the State of Illinois perceived facts in the affidavit of Officer Young which simply are not there.

CONCLUSION

In view of the foregoing it is respectfully submitted that the Petition for *Certiorari* should be granted and that this Honorable Court give plenary consideration to the issue presented. In the alternative, in recognition of the Court's case load, perhaps this may be that type of situation in which justice can best be served through the summary reversal of the decision of the Supreme Court of the State of Illinois for it entails only the failure of that Court to apply well established principles of law to the facts.

Respectfully submitted,

JOHN J. O'TOOLE
111 W. Washington Street
Chicago, Illinois 60602

PETER GEORGES
10 S. LaSalle Street
Chicago, Illinois 60603

APPENDIX A

OPINION
SUPREME COURT
OF ILLINOIS

UNITED STATES OF AMERICA

State of Illinois }
Supreme Court } ss.

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the thirteenth day of September in the year of our Lord, one thousand nine hundred and seventy-one, within and for the State of Illinois.

PRESENT: ROBERT C. UNDERWOOD, CHIEF JUSTICE

JUSTICE WALTER V. SCHAEFER
JUSTICE DANIEL P. WARD
JUSTICE JOSEPH H. GOLDENHERSH
JUSTICE THOMAS E. KLUCZYNSKI
JUSTICE CHARLES H. DAVIS
JUSTICE HOWARD C. RYAN

WILLIAM J. SCOTT, ATTORNEY GENERAL

ROBERT G. MILEY, MARSHAL

ATTEST: JUSTIN TAFT, CLERK

BE IT REMEMBERED, that afterwards, to-wit, on the 4th day of October, 1971, the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

People State of Illinois,
Appellee

No. 43004 *vs.*

Samuel Saiken,
Appellant

Appeal from Circuit Court, Cook County

JUSTIN TAFT
Clerk of the Supreme Court
State of Illinois

Docket No. 43004—Agenda 15—May, 1971

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. SAMUEL SAIKEN, Appellant.

MR. JUSTICE DAVIS delivered the opinion of the court:

The defendant, Samuel Saiken, was indicted by the circuit court of Cook County for the crimes of murder and conspiracy to obstruct justice. A jury returned a verdict of not guilty on the murder charge and guilty on the charge of conspiracy to obstruct justice.

The defendant claims that the search which led to the discovery of the body of the victim was improper and in violation of constitutional and statutory provisions; that the jury verdict was against the manifest weight of the evidence; and that the trial court abused its discretion in denying probation and in sentencing him to the penitentiary for a term of not less than 2 nor more than 3 years.

The defendant was indicted for murdering Ella Jean Scott, also known as Tina Mumma, and for conspiring with his son, Joel Saiken, to obstruct justice by concealing the victim's body in a steel drum and burying it on his farm in Chesterton, Indiana.

The victim was a friend of both the defendant and his son. The defendant testified that he met her at O'Hare Airport on November 4, 1967, and that they drove to the defendant's farm in Chesterton, Indiana, where they picked up Joel, the defendant's son, and the three of them, along with the victim's cat, then returned to the defendant's warehouse, in Chicago; that when they arrived at the warehouse, Joel and the victim went in, but Joel returned alone after five minutes; that shortly thereafter, Joel admitted that he had killed Mrs. Mumma. The defendant denied that he in any manner conspired to obstruct justice.

Joel testified that he never saw the victim alive on November 4 or 5; that he had been at the farm in Chesterton; and that his father had gone to O'Hare Airport to meet Mrs. Mumma. He further stated that his father came back alone the next day, and admitted to him that he (the father) had killed Mrs. Mumma; that he and the defendant then went to the warehouse and placed the victim's body in a steel drum; that the defendant then asked him to bury the body on the farm; and that he buried the body behind the goose barn on the eastern side of the farm.

The defendant's version was corroborated by a gas station attendant, who had seen the defendant, Joel, the victim and the cat, at, and about, his service station while minor repair work was done on the defendant's car at about 2 A.M. on November 5.

At the hearing on the motion to suppress evidence, Officer Young, on whose affidavit the search warrant was issued, testified that on the evening of February 18, 1969, he had a conversation with the defendant's son, Joel, for about one and one-half hours; that Joel told him that he had buried the body on the farm under a manure pile behind the goose barn; and that the victim had died from a shotgun wound.

As a result of this information, Officer Harry Young obtained a search warrant on February 19, 1969; and made a search for the body. He dug near the goose barn for about two hours. The ground was frozen hard and he was unable to find the body. That evening he again talked to Joel, who further pinpointed the location of the body. The next day, Officer Young returned to the spot behind the goose barn and continued the excavation at the place where he had been digging the day before, and about 4 hours later he found the body.

The defendant contends that the affidavit of Officer Young on which the search warrant was issued, was insufficient in that it was based upon hearsay. The affidavit, subscribed to before Harry W. Esther, Justice of the Peace, stated:

> "HARRY YOUNG swears that by virtue of information voluntarily conveyed to him by one JOEL SAIKIN on Tuesday, the 18th day of February, 1969, affiant has good reasons to believe, and does believe, that a dead human body, to-wit: a white, female approximately seventeen (17) years of age is secreted in and about the following real estate in Porter County, Indiana:
>
> The East ½ of the Southeast ¼ of the Southwest ¼ of Section 17, Township 37 North, Range 5 West of the Second Principal Meridian, containin about 20 acres more or less,

said real estate being the property of Sam. D. and Minnie Saikin, said dead body being secreted in the following place and manner, to-wit: buried beneath the ground behind the goose house on said premises, originally buried under or near a manure pile located behind or near the goose house on said premises, said manure pile subsequent thereto having been removed.

"Under and according to the provisions of Acts 1905, page 169, paragraph 61, the same being codified as Burns Indiana Statutes 9—607, that the Honorable Judge of this Court, taking with him such constables and police officers as he shall designate, enter, inspect and search said premises for such dead female human body as soon as may be reasonably convenient to said Court and said judge".

The courts of the State of Indiana have held that an affidavit based upon hearsay information and conclusions of the affiant is insufficient to show probable cause and will not support the issuance of a search warrant. (*Johns* v. *State*, 251 Ind. 172, 240 N. E. 2d 60; *McCurry* v. *State*, 249 Ind. 191, 231 N. E. 2d 227; *Rohlfing* v. *State*, 227 Ind. 619, 88 N. E. 2d 148). In *McCurry*, the court acknowledged that its rule as to the sufficiency of an affidavit to support the issuance of a search warrant—that hearsay will not support the issuance of a search warrant—is not the rule as announced by the United States Supreme Court in *Jones* v. *United States*, 362 U. S. 257, 4 L. Ed. 2d 697, 80 S. Ct. 725.

These circumstances give rise to the question of whether an Illinois circuit court in a prosecution before it should suppress evidence gained from a search in Indiana, which was illegal there because based upon hearsay information contained in the affidavit supporting the search warrant.

In *Burge* v. *State* (Tex. Crim. App. 1969), 443 S. W. 2d 720, the defendant, an Oklahoma resident, was accused of burglary and attempted rape in Texas. While he was in custody, his wife agreed to allow police officers to search their Oklahoma home without a search warrant. Under Oklahoma law each spouse has a personal right to demand a search warrant prior to a search of the marital residence. The search, conducted without the defendant's consent, revealed crucial incriminating evidence against him, which was admitted at the Texas trial. On appeal, he contended that the trial court erred in admitting this evidence. The State urged that this was an evidentiary question, procedural in nature, and hence was governed by the laws of Texas, which recognized intersposual authority to consent to the search. The reviewing court affirmed the trial court and held that the Texas-Oklahoma conflict was primarily upon the issue of the admissibility of evidence—one of procedure—, and that the law of the forum governed.

Traditional conflict principles prescribe that issues of clearly procedural nature are governed by the internal laws of the forum, whereas substantive matters are controlled by the laws of the State where the transaction occurred.

Conflicting State views concerning the scope of the fourth amendment and of the additional rights granted to a party by a State, present a novel situation in the area of conflict of laws. The doctrine of *lex loci delicti* has been extensively criticized and there has been a propensity to replace it by a more flexible rule, *i. e.*, the rule of "significant relationship" embodied in tentative draft No. 9 of section 379, Reinstatement of the Law, Second, Conflict of Laws (1964). See *Graham* v. *U. S. Grant*

Post, 43 Ill. 2d 1 and 97 Ill. App. 2d 139, and cases cited therein.

If the problem here presented is considered from the procedural-substance viewpoint, the evidence was properly admitted. (*People* v. *Kirkpatrick*, 413 Ill. 595, 597; Restatement, Conflict of Laws, sections 595, 597). Evidentiary questions are generally governed by the laws of the forum. If the conflict concerning the choice of law encompassed the preliminary issue of whether the evidence was wrongfully obtained, a substantive matter, then from the viewpoint of "significant relationship" or "center of gravity" rules, the significant contacts were with Illinois. The crime was committed in Illinois; it was being prosecuted there; the defendant was a resident and citizen of Illinois; the great majority of the witnesses, who would testify at the trial, were Illinois residents; Indiana had no vital contact with the crime; and the application of Illinois evidentiary law would not offend the comity of interstate relationships between Indiana and Illinois.

In *United States* v. *Teller*, (7th cir. 1969) 412 F. 2d 374, 377; *United States* v. *Martin*, (7th cir. 1967) 372 F. 2d 63, 65, and in *United States* v. *Jones*, (7th cir. 1966) 369 F. 2d 217, 220, the court held that evidence gained by eavesdropping, illegal under Illinois law, (Ill. Rev. Stat. 1965, ch. 38, par. 14-1 *et seq.*) was admissible in Federal prosecutions. These decisions rest on the premise that Federal courts are only required to follow Federal standards when Federal questions are adjudicated, regardless of whether such standards violate any additional rights granted to a party by a State.

Ker v. *California*, 374 U. S. 23, 10 L. Ed. 2d 726, 83 S. Ct. 1623; *Miller* v. *United States*, 357 U. S. 301; 2 L. Ed. 2d 1332, 78 S. Ct. 1190; *United States* v. *Di Re*, 332 U. S.

581, 92 L. Ed. 210, 68 S. Ct. 222; while not in point, would seem to indicate that where a conflict occurs between the standards of two jurisdictions, there is no constitutional barrier, other than the fourth amendment, which precludes one jurisdiction from refusing to honor the standards of another relative to the validity of an arrest or search.

In *Elkin* v. *United States*, 364 U. S. 206, 4 L. Ed. 2d 1669, 80 S. Ct. 1437, the court held that evidence obtained by State officers in a search which, if conducted by Federal officers, would have violated the defendant's rights under the fourth amendment, was inadmissible, over the defendant's objection, in a Federal prosecution. This exclusionary rule was applied before the application of the fourth amendment to the State and the establishment of the general exclusionary rule in *Mapp* v. *Ohio*, 367 U. S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684. Under this rationale, the standards for the validity of a search may vary from State to State so long as they do not violate Federal constitutional standards.

Thus under constitutional choice of law or principles, the evidence in question was admissible in Illinois, if the Indiana search met with the requirements of the fourth amendment.

Under the requisites of the fourth amendment, the matters presented in the affidavit in support of the warrant must be adequate to enable the magistrate to form an independent conclusion as to whether from the facts and underlying circumstances presented to him under oath, probable cause exists for the issuance of the warrant. However, reviewing courts will more readily accept the judicial determination of a magistrate with reference to probable cause and will uphold his issuance of a warrant

on evidence of a less persuasive character than would have justified an officer acting on his own determination and without a warrant. (*Aguilar* v. *Texas*, 378 U.S. 108, 111, 12 L. Ed. 2d 723, 726, 84 S. Ct. 1509). Because of the preference for informed and deliberate determinations of magistrates over perhaps hurried actions of officers in making searches incidental to arrests, the affidavits are to be tested in a common sense and realistic manner and with great deference to the magistrate's determination of probable cause. *United States* v. *Harris*, 403 U.S. 573, 29 L. Ed. 2d 723, 730-732; *Spinelli* v. *United States*, 393 U.S. 410, 419; 21 L. Ed. 2d 637, 645, 89 S. Ct. 584; *People* v. *Parker*, 42 Ill. 2d 42, 45.

The United States Supreme Court has held that hearsay information set forth in an affidavit, may be sufficient to support the issuance of a search warrant, as long as the affidavit contains a substantial basis to support the credibility of the hearsay information. (*United States* v. *Harris*, 403 U.S. 573, 29 L. Ed. 2d 723, 732; *Jones* v. *United States*, 362 U.S. 257, 271, 4 L. Ed. 2d 697, 708, 80 S. Ct. 725). We have adhered to that rule. *People* v. *Mitchell*; 45 Ill. 2d 148, 152, 153; *People* v. *York*, 29 Ill. 2d 68, 70; *People* v. *Williams*, 27 Ill. 2d 542, 544.

In *Aguilar*, the court said that for hearsay to justify the issuance of a warrant, the affidavit must set forth some underlying circumstances tending to substantiate the informant's conclusions and some underlying circumstances from which it could be believed that the informant's information was credible or reliable. 378 U.S. 108, 114, 12 L. Ed. 2d 723, 729, 84 S. Ct. 1509.

In *Spinelli* v. *United States*, 393 U.S. 410, 425, 21 L. Ed. 2d 637, 649, 89 S. Ct. 584, Mr. Justice White, in a separate concurring opinion stated: "If the affidavit rests

on hearsay—an informant's report—what is necessary under *Aguilar* is one of two things: the informant must declare either (1) that he has himself seen or perceived the fact or facts asserted; or (2) that his information is hearsay, but there is good reason for believing it—perhaps one of the usual grounds for crediting hearsay information. The first presents few problems: since the report, although hearsay, purports to be firsthand observation, remaining doubt centers on the honesty of the informant, and that worry is dissipated by the officer's previous experience with the informant. The other basis for accepting the informant's report is more complicated. But if, for example, the informer's hearsay comes from one of the actors in the crime in the nature of admission against interest, the affidavit giving this information should be held sufficient". Also see *United States* v. *Harris*, 403 U.S. 573, 29 L. Ed. 2d 723, 734.

In the case at bar, the informant, Joel Saiken, personally saw or perceived the facts asserted. He buried the body. A number of facts are recited as to the location of the body, and we have the first situation referred to by Mr. Justice White. The remaining question is whether there is a basis presented in the affidavit to suggest that the informant is honest in what he has said. The assertions of the informant—that he buried and hid a dead body—constitutes an admission of his implication in a crime, which is sufficient to lend credence to what he has said. We believe there was substantial basis for crediting the hearsay information, and that the search warrant was properly issued upon the affidavit.

The defendant claims that even if the search warrant were valid, the search on the second day was an independent search, not pursuant to the original warrant. He

refers us to *McDaniel* v. *State*, 197 Ind. 179, 150 N. E. 50, and *Tongut* v. *State*, 197 Ind. 539, 151 N. E. 427. However, we find that these cases are not applicable to the case at bar.

In executing the warrant, the officers commenced digging in search for the body but because the ground was frozen hard they were unable to complete the search the first day. Upon further pinpointing the burial location, they resumed the work of the search the following morning and found the body. They had proceeded with diligence, and their conduct the second day constituted a continuation of the initial search.

Section 9—607 of Burns Indiana Statutes Ann. (Acts of 1905, ch. 169, sec. 61, p. 584) provides that when an affidavit is filed before a justice of the peace or city judge alleging that a dead human body is hidden, such justice of the peace or city judge, taking with him a constable or police officer, may enter, inspect and search for such dead body "and in making such search, they shall have the powers of officers executing search warrants". The search was conducted under the provisions of this section. The defendant claims that the search was improper because the justice of the peace, who went to the premises on the first day, did not return the second day. We have been unable to find any interpretation of this section of the statute by the Indiana courts. However, we do not believe that the statute can reasonably be interpreted to mean that the justice of the peace must remain on the premises during the entire search. The statute states that the justice of the peace shall take with him a constable or police officer and that "they" shall have powers of officers executing search warrants. The word "they" clearly refers to the officer as well

as the justice of the peace. Inasmuch as the search on the second day was a continuation of the initial search, we find no greater basis for holding that the justice of the peace had to return to the site on the second day of the search than for finding that he had to remain on the premises during the entire period of the search on the first day. Neither such determination is required and we find the search to be a legal one.

The jury chose to disbelieve the version of events testified to by Joel regarding who actually committed the murder, but by its verdict, apparently it believed that part of his story relating to the manner of disposing of the body. There was, of course, a great deal of self-interest in the matters testified to by Joel—especially as to who committed the murder. However, the conclusion reached by the jury is not so improbable or unreasonable, particularly in view of the defendant's vague testimony regarding the disposition of the body, that we should substitute our conclusion in its stead.

The defendant has urged that the verdicts were inconsistent. He was indicted in separate counts for the crimes of murder and conspiracy to obstruct justice. We cannot speculate as to why the jury found him not guilty of murder, but such finding did not invalidate the jury finding of guilty on the conspiracy charge. The evidence concerning such charge was sufficient to sustain the conviction. We find that the verdicts here were not inconsistent.

The sentence imposed by the trial court was within the limits prescribed by statute. Our power to reduce and modify sentences should be exercised with caution. Considering all of the elements of this case and the matters brought to the attention of the trial court, we

do not find that the imposition of the penalty imposed by the court constituted a great departure from the fundamental law and its spirit and purpose, or that it was manifestly in excess of the proscription of section 11 of article II of the Illinois constitution. *People* v. *Taylor,* 33 Ill. 2d 417, 424; *People* v. *Smith,* 14 Ill. 2d 95, 97.

The granting of probation was within the discretion of the trial court. Its determination is subject to review to the extent of ascertaining whether the trial court did, in fact, exercise discretion or whether it acted in an arbitrary manner. (*People* v. *Sims,* 32 Ill. 2d 591, 596). The scope of the judicial discretion is set forth in section 117-1 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1969, ch. 38, par. 117-1). In considering the matters pertinent to the defendant's conduct, to his rehabilitation and to the public's interest, we do not believe that the trial court acted arbitrarily. Therefore, the judgment will be affirmed.

Judgment affirmed.

APPENDIX B

State of Illinois

Office of

CLERK OF THE SUPREME COURT

Springfield

62706

November 24, 1971

JUSTIN TAFT
Clerk

Telephone
Area Code 217
525-2035

Mr. Peter George
Attorney at Law
10 So. LaSalle St.
Chicago, Ill. 60603

No. 43004—People State of Illinois, appellee, vs. Samuel Saiken, appellant. Appeal, Circuit Court (Cook).

You are hereby notified that the Supreme Court today *denied* the petition for rehearing in the above entitled cause.

Very truly yours,
JUSTIN TAFT
Clerk of the Supreme Court